

CASE NO. 109807

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA STATE CHIROPRACTIC INDEPENDENT PHYSICIANS
ASSOCIATION, AN Oklahoma Corporation, and J. DAN POST, Doctor
of Chiropractic, and BRAD M. HAYES, Doctor of Chiropractic, on
behalf of themselves and all of those similarly situated,

Petitioners,

v.

THE HONORABLE MARY FALLIN, in her Official Capacity only as Governor of the
State of Oklahoma, THE HONORABLE SCOTT PRUITT, in his Official Capacity only as
Attorney General of the State of Oklahoma, ; and THE HONORABLE MICHAEL J.
HARKEY, THE HONORABLE ERIC W. QUANDT, THE HONORABLE GENE
PRIGMORE, THE HONORABLE CHERRI FARRAR, THE HONORABLE JOHN M.
MCCORMICK, THE HONORABLE KENT ELDRIDGE, THE HONORABLE BOB
LAKE GROVE, THE HONORABLE WILLIAM R. FOSTER, JR., THE HONORABLE
DAVID REID, and THE HONORABLE OWEN T. EVANS, each in his or her Official
Capacity only as Presiding Judge, Vice Presiding Judge and Judges of the Workers'
Compensation Court of the State of Oklahoma,

Respondents.

PETITION FOR REHEARING BY RESPONDENTS GOVERNOR MARY FALLIN, IN HER OFFICIAL
CAPACITY, AND OKLAHOMA ATTORNEY GENERAL
E. SCOTT PRUITT, IN HIS OFFICIAL CAPACITY

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January 9, 2012

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PETITION FOR REHEARING BY RESPONDENTS GOVERNOR AND ATTORNEY GENERAL

Respondents Governor Mary Fallin and Oklahoma Attorney General E. Scott Pruitt request that this Court reconsider and withdraw the Court's Opinion entered December 20, 2011, for the following reasons:

- I. IN THE ABSENCE OF (1) THE CONSTITUTION PROHIBITING THE LEGISLATURE FROM ESTABLISHING OR CHANGING A BURDEN OF PROOF, OR (2) THE CONSTITUTION CONSIGNING TO THE JUDICIARY THE DUTY TO PRESCRIBE THE BURDEN OF PROOF, THIS COURT'S RULING THAT A LEGISLATIVE CHANGE IN THE BURDEN OF PROOF¹ VIOLATES THE SEPARATION OF POWERS DOCTRINE IS IN ERROR AND SHOULD BE RECONSIDERED.**

In four sentences, the Opinion addressed and disposed of the Chiropractors' separation of powers challenge to the second sentence of 85 O.S. Supp. 2011, § 329(J), and severed the sentence.² The severed sentence required that "[t]he opinion of the independent medical examiner shall be followed unless there is clear and convincing evidence to the contrary." *Id.* The Court's discussion regarding the Chiropractors' separation of powers challenge to § 329(J) is in its entirety as follows:

¶13. In the present matter the Legislature has attempted to change the standard of review³ in the Workers' Compensation Court from preponderance of the evidence to the standard of clear and convincing evidence. Therefore, 85 O.S. Supp. 2011 § 329(J) the last sentence of which provides in pertinent part, "(t)he opinion of the independent medical examiner shall be followed unless there is a clear and convincing evidence to the contrary," must be severed. . . .

¶14 . . . We also hold that the specifically mentioned portions of 85 O.S. Supp. 2011 §§ 326, 329 and 332 violate the separation of powers clause, Art. IV, § 1

¹ Since the issues before this Court deal with trial-court-level evidentiary matters, and not with appellate matters, the Respondents assume the Opinion's reference to the "standard of review", which term is normally applicable to appeals, is actually a reference to the "burden of proof", which term is normally applicable to evidence presented at trial. Therefore, Respondents use the term "Burden of Proof" herein when referencing the level of proof in the trial court.

² The Chiropractors challenged and claimed injury from only 85 O.S. Supp. 2011, §§ 329 and 333, but similar language in 85 O.S. Supp. 2011, §§ 326 and 332 was *sua sponte* by the Opinion found to violate the separation of powers doctrine.

of the Oklahoma Constitution. Therefore, such portions of the offending statutes explicitly specifically referenced herein are hereby severed.

The Opinion contains no analysis or explanation as to how a legislative change in the burden of proof could constitute a violation of the separation of powers. The Opinion implies that the Court believes only the Judiciary, and not the Legislature, has the power to prescribe the burden of proof. Such a ruling is contrary to the Court's more than 100-year history of finding that the Legislature has the power to prescribe rules of evidence and burdens of proof³. Thus, the Respondents request the Court to reconsider and to withdraw its opinion finding a separation of powers violation regarding the burden of proof in any of the newly enacted statutes as such a finding is contrary to long established law.

The legislature may prescribe the rules to be observed in the production of evidence in court. It may shift from one to the other the burden of proof. It may declare documents prima facie evidence of their own validity, and require the other party to affirmatively show their falsity. The power of the legislature to shape or mold the rules of evidence for the purpose of justice is unquestioned, but such power does not go to the extent of precluding a hearing, or of a denial of justice.

Weeks v. Merkle, 1898 OK 24, ¶ 9,52 P. 929, 932 (emphasis added). While the power of the Legislature is very broad, it may not "make the showing by one party to a controversy conclusive of the truth of the facts shown, and in that manner [deny] to the adverse party to the proceeding a hearing". *Id.* (Legislature cannot make tax deed conclusive evidence of its validity). In other words, the Legislature does not have the power to establish an irrebuttable presumption which would prevent a party from having a hearing.

As to what shall be evidence, and which party shall assume the burden of proof, in civil causes, [the Legislature's] authority is practically unrestricted,

³ As an example of the Legislature's long and broad history of statutorily prescribing burdens of proof attached appendix listing of statutes prescribing burdens of proof.

so long as its regulations are impartial and uniform; **but it has no power to establish rules which** under pretense of regulating the presentation of evidence, go so far as altogether to **preclude a party from exhibiting his rights**. . . . In judicial investigations, **the law of the land requires an opportunity for a trial**, and there can be no trial if only one party is suffered to produce proofs.

Wilson v. Wood, 1900 OK 87, ¶ 14, 61 P. 1045, 1046-1047 (emphasis added)(quotation and citation omitted)(making a tax deed conclusive evidence of complete title was unconstitutional as it deprived persons interested in the real estate from having its validity inquired into). The “clear and convincing evidence” language this Court severed, is nothing more than a burden of proof which the Legislature historically and constitutionally has the power to establish.⁴ It does not preclude any party from introducing evidence. It does not preclude a trial to either the claimant or to the employer. The Legislature acted within its power in accordance with *Wilson*.

It is doubtless competent for the Legislature to prescribe many of the rules of evidence. The subjects of the competency of witnesses, the order of trial, the burden of proof, the effect of public records, the certification of copies of official documents, the prima facie character of certain evidence, and other like matters which pertain to the practice rather than the right of proving causes, are lawfully within the sphere of legislative regulation; but it is not within the power of the Legislature to exclude from the courts that which proves the truth of a case, nor on the other hand, to compel them to receive that which is false in character.

Taylor v. Anderson, 1914 OK 35, ¶ 11, 137 P. 1183, 1186-1187 (emphasis added)(quotation and citation omitted)(statute which made the weight of cotton as determined by the weigh master to be absolutely conclusive and not subject to challenge was held unconstitutional). Thus, the Legislature cannot “deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he come into court is the same, in effect, as the law which deprives him of his day in court.” *Id.* at 1186. The clear and convincing language

⁴ The attached appendix contains Approximately 81 statutes in which the Legislature prescribed a clear and convincing evidence standard.

challenged by the Chiropractors does not deprive either the claimants or employers of their day in court. Nor does it relieve the Workers' Compensation Judges of their duty to determine the weight and sufficiency of the evidence and to determine whether the clear and convincing burden has been met. Under *Taylor*, the burden of proof set by the Legislature passes constitutional muster.

“It is quite customary, and not *ultra vires*, for the Legislature to prescribe rules of evidence.” *Treese v. Ferguson*, 1925 OK 876, ¶ 3, 251 P. 91, 93 (emphasis added). *See also, Oklahoma Evidence Code*, 12 O.S. §§ 2101-3011. There are at least 195 statutes in which the Legislature established various burdens of proof in a variety of situations. See attached Appendix. Of the 195 statutes, the Legislature established a clear and convincing evidence standard 81 times. See attached appendix. The Opinion's implication – that only the Judiciary and not the Legislature may establish or change the burden of proof – calls into question the constitutionality of all statutes in which the Legislature prescribed the burden of proof.

The Opinion's finding that the Legislature cannot change the burden of proof is particularly troublesome when applied to Workers' Compensation statutes. The Workers' Compensation [Code], “is legislation which abrogates the common-law, creates statutorily exclusive rights in the field it operates, along with remedies and procedures, and is hence, *sui generis*.” *Ingram v. ONEOK, Inc.*, 1989 OK 82, ¶ 13, 775 P.2d 810, 813. Because the Workers' Compensation Code and Court are entirely statutory, the Legislature has more power to control workers' compensation practice and procedure than it does proceedings in the district court. The Constitution gives the Legislature the power to change and/or abolish the Workers' Compensation Court, if it so chooses.

“Generally, it is not the province of this Court to judicially sanction **the making of changes in workers’ compensation statutes**, or rights created thereunder, for this is **within the prerogative of the legislature in the exercise of its police power.**” *Id.* Thus, it is for the Legislature to define and determine the practice and procedure before the Workers’ Compensation Court, and it may not delegate to the Courts the right to do so. **“It is fundamental that the Legislature may not part with, or delegate to others, its right to exercise the police power.”** *Cities Service Gas Company v. Witt*, 1972 OK 100, ¶ 9, 500 P.2d 288, 290 (emphasis added). Just as the Legislature may not delegate to the Courts its power regarding the Workers’ Compensation Court, neither may the Courts take it upon themselves to expand the Courts’ authority over the workers’ compensation system . *Id.* at 291 (the Workers’ Compensation Court may not by rule expand its own jurisdiction.). “It is well settled that the [Workers’ Compensation Court] is a statutory tribunal of limited jurisdiction and has only such jurisdiction as is conferred by law.” *Id.*

Thus, it is clearly within the province of the Legislature under its police power, and not prohibited by the Constitution, for the Legislature to establish the rules of evidence and procedure for the Workers’ Compensation Court. It has not delegated, and cannot delegate, that power to the Judiciary.

“In ascertaining the constitutionality of a legislative act, we do not look to the constitution to determine whether the Legislature is authorized to do an act, but whether the legislature is prohibited doing an act.” *Muskogee Urban Renewal Authority v Excise Board of Muskogee County*, 1995 OK 67, ¶ 20, n. 21, 899 P.2d 624, 630 at n. 21. The Opinion does not identify any constitutional provision which prohibits the Legislature from prescribing the burden of proof or standard of review. “The separation-of-powers doctrine interdicts legislative intrusion

upon the functions assigned to the judiciary by the constitution.” *Yokum v. Greenbriar*, 2005 OK 27, ¶ 13, 130 P.3d 213, 220. The Opinion does not identify any constitutional provision by which the designation of the burden of proof is constitutionally consigned to the Judiciary. Because there is no such prohibition against the Legislature, nor constitutional consignment to the Judiciary, the Legislature did not violate the separation of powers when it established a clear and convincing evidence burden of proof. This is particularly so once the Court determined to be severable the restrictions on which physicians may serve as IME’s or upon which permanent partial disability reports the trial court may rely. With that determination of severability, the trial court may once again rely on reports from the full panoply of statutorily defined physicians.

Thus, Respondents request that this Court reconsider its Opinion and withdraw its ruling regarding the separation of powers.

A perhaps unanticipated consequence of the Opinion is that it calls into question the constitutionality of other statutes. This Court has long recognized the Legislature’s changes in the standard of review, both as applied to the workers’ compensation court’s three-judge panel and to appeals in this Court. *Parks v. Norman Municipal Hospital*, 1984 OK 53, 684 P.2d 548, 551. In *Parks*, the Court acknowledged that when the statutes enacting the State Industrial Court were repealed and replaced with the Workers’ Compensation Court, the Legislature curtailed the power of the Workers’ Compensation Court three-judge panels and eliminated the prior ability to at will reverse a trial judge’s findings. The Court acknowledged that the Legislature had placed a new restriction on three-judge panel and that the panel would now have to determine a trial judge’s finding to be “against the clear weight of the evidence or contrary to law” before the panel could reverse or modify the trial judge’s order. *Id.* At that time, this Court recognized that the legislatively mandated standard of review on appeal remained the same –

appellate review being limited to questions of law, with no power in the appellate tribunal to re-weigh the evidence. *Id.* at 552. Nothing in *Parks* suggests that the Legislature does not have the constitutional power to change the standard of review and to reduce the authority of the workers' compensation three-judge panel. Now, without explanation or analysis, the Opinion in the present case holds that a legislative change in the "standard of review" violates the separation of powers doctrine.

Recently, this Court dealt with the "standard of review" and recognized that the Legislature in 2010 changed and expanded the scope of the appellate standard of review in workers' compensation cases. *Dunlap v. The Multiple Injury Trust Fund*, 2011 OK 14, ¶ 1, 249 P.3d 951, 952. Whereas before the appellate court could not re-weigh the evidence on appeal, the new "amendment authorized review of an order or award to determine whether it was against the clear weight of the evidence." *Id.* The new 2010 standard of review is incorporated in the 2011 Workers' Compensation Code at 85 O.S.2011, §340(D)(4). Nothing in the *Dunlap* decision suggests that the Legislature lacks authority to change a "standard of review".

The Opinion in this case finding that the Legislature's change in the "standard of review" constitutes a violation of the separation of powers, creates confusion and calls into question the constitutionality not only of the recent change in the appellate "standard of review", but also the constitutionality of all statutes prescribing a "burden of proof". Respondents request that the part of the Opinion addressing the separation of powers be reconsidered as is needlessly creates confusion as to the constitutionality of a multitude of statutes prescribing burdens of proof and/or standards of review.

II. WITH THE COURT'S DETERMINATION THAT THERE WERE SPECIAL LAWS WHICH WERE SEVERABLE, (1) THE CHIROPRACTORS WERE PLACED ON THE SAME FOOTING AS MD'S AND DO'S, (2) THE CHIROPRACTORS WERE PERMITTED TO SERVE AS IME'S AND

QIME'S AND TO WRITE PPD REPORTS, AND (3) THE WORKERS' COMPENSATION JUDGES COULD AGAIN RELY ON CHIROPRACTOR REPORTS WITHOUT INVOLVEMENT OF DO'S OR MD'S.

WITH THE COURT'S DETERMINATION THAT THE "SPECIAL LAW" PARTS OF SECTIONS 308(39), 329(A), AND 333(B) WERE SEVERABLE, ANY POSSIBLE JUSTICIABLE CONTROVERSY AS TO THE CHIROPRACTORS WAS RESOLVED. THUS, THE CHIROPRACTORS WOULD SUFFER NO FURTHER INJURY/HARM AND LACKED STANDING, AND THE COURT LACKED AUTHORITY, TO ADDRESS THE CONSTITUTIONALITY OF THE PROVISIONS OF THE WORKERS' COMPENSATION CODE REMAINING AFTER SEVERANCE OF THE ALLEGEDLY IMPERMISSIBLE SPECIAL LAW PROVISIONS.

The Chiropractors claimed standing to challenge 85 O.S. Supp. 2011, §§ 329 and 333 because said statutes excluded them from the workers' compensation system and they could not serve as independent medical examiners (IME's) or their reports be used to support claims for permanent partial disability (PPD), whereas they could in the past; plus Chiropractors could serve as treating physicians, but not as Qualified Independent Medical Examiners (QIME's). *Opinion* at ¶¶ 1-3. The Chiropractors did not claim injury from, nor challenge, any other statutes, only §§ 329 and 333.

This Opinion determined that the challenged portions of 85 O.S. Supp. 2011, §§ 329 and 333, plus the QIME definition in 85 O.S. Supp. 2011, § 308(39), which did not treat chiropractors, dentists, podiatrists and optometrists the same as DO's and MD's, were unconstitutional special laws. *Opinion* at ¶¶ 11-12. The Opinion next addressed whether those offending provisions could be severed, holding as follows:

In this regard, we must determine whether the purpose of the statute would be significantly altered by severing the offending language, whether the Legislature would have enacted the remainder of the statute without the offending language, and whether the non-offending language is capable of standing alone. [citation omitted] The removal of the language merely upholds the status quo. The 2011 workers' compensation reform act contained 88 sections and 149 pages seeking comprehensive reform of existing workers' compensation jurisprudence. In view of the scope and breadth of the statutory changes in the 2011 workers' compensation reform act, **it is our opinion that the purposes of the act would**

not be significantly altered by severing the offending language and that the Legislature would have enacted the statute without the offending language. The non-offending language can stand alone. Title 75 O.S.2001, ¶ 11a provides that “. . . the provisions of every act or application of the act shall be severable. If any provision or application of the act is found to be unconstitutional and void, the remaining provisions or applications of the act shall remain valid . . .”

Opinion, ¶ 12 (emphasis added). As such, the Court determined that the offending special law portions of 85 O.S. Supp. 2011, §§ 308(39), 329(A) and 333(B) could be severed.

With the determination that severance of the special law provisions was possible, all restrictions on the Chiropractors were lifted. All alleged harm/injury to the Chiropractors, upon which they had based their claim to standing, had been averted. With all alleged Chiropractor injury alleviated, the questions then become: (1) whether the Chiropractors had standing to challenge the claimant’s burden of proof in 85 O.S. Supp. 2011, ¶ 333(J) (“The opinion of the independent medical examiner shall be followed unless there is clear and convincing evidence to the contrary”); and (2) whether after severing ¶ 333(J) at *Opinion* ¶ 13, the Court could then proceed further to *sua sponte* address the constitutionality of, and sever, two additional statutes not challenged by the Chiropractors, §§ 332(C) and 326(G) (rebuttable presumptions in favor of treating physician reports and in favor of employers and insurance carriers regarding liability for certain medical treatment not provided in accordance with guidelines).

The Chiropractors did not have standing to address the constitutionality of other statutes once the offending “special law” provisions were determined to be severable. *See, Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 995-99 (3d Cir. 1993)(once offending provisions of the Ordinance applicable to contractors were determined

severable, contractors lacked standing to attack constitutionality of other sections of the Ordinance).⁵

“Because standing seeks to ensure a party has a ‘personal stake in the controversy’, courts typically only allow a party to raise his own rights rather than the rights of others, *Broadrick v. Oklahoma*, 413 U.S. 601, 613 . . . (1973).” *Id.* at 996 (citation omitted). “Allowing parties only to litigate their own rights is especially important in constitutional actions because the Supreme Court cautions ‘never to anticipate a question of constitutional law in advance of the necessity of deciding it [and] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” *Id.* (citing *United States v. Raines*, 362 U.S. 17, 21(1960)). **“[W]hen a court determines the legislature intended the challenged sections of a statute to operate independently of the unchallenged sections and finds these sections can so operate, it will consider only the challenged sections, leaving the remainder of the statute intact.”** *Id.*(emphasis added).

The Ordinance in *Contractors Association* dealt with three types of contracts -- vending and services contracts and construction contracts. *Id.* at 998. The plaintiff Contractors had a personal interest only in construction contracts. *Id.* at 996-997. They attempted to challenge constitutionality of Ordinance provisions regarding all three types of contracts, contending the construction contract provisions were not severable from the vending and service contract

⁵ Oklahoma law regarding standing is substantially similar to federal law, with a difference that a state defendant may waive standing, whereas standing can never be waived in federal court. While state and federal courts examine the same elements in determining whether standing exists, standing in state court may be waived by the state court defendant, but standing is not waivable in federal court. *Toxic Waste Impact Group, Inc. v. Leavitt*, 1994 OK 148, ¶¶ 2-3, 890 P.2d 906, 914-915 (Opala, J., concurring) ([plaintiff’s lack of standing] “is *waivable* at the option of the defendant [in state court];”). Like jurisdiction, standing must be inquired into by the Court *sua sponte*. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 6, 163 P.3d 512, 519.

provisions. *Id.* at 997. As did this Court, the appellate Court in *Contractors Association* found that the unconstitutional Ordinance construction contract provisions in which the Contractors had an interest were severable from the other Ordinance provisions. *Id.* at 998. Because the Contractors had a personal stake only in the severable construction contract provisions, the court held it was limited [by the Contractors lack of standing] to reviewing only those severable provisions in which they had a personal stake. *Id.* The only exception would be if the Contractors had third-party standing to assert the rights of other non-party businesses affected by vending and services contracts provisions. *Id.*

After examining the exceptions, the Court found that the Contractors not did fall within any of the situations in which third-party standing to assert the rights of others is recognized. *Id.* at 998. Thus, the Court found that the Contractors had “standing only to challenge the provisions of the Ordinances relating to construction contracts. Accordingly, we will vacate that portion of the district court’s order invalidating the remainder of the Ordinance.” *Id.* at 999.

In this case, the Court found the alleged harm/injury to the Chiropractors was that they were not on the same footing as MD’s and DO’s. With the finding of severability of the provisions restricting which PPD reports the court may rely on, and the severability of the restrictions on who may serve as an IME or QIME, the Chiropractors were again placed on an equal footing with MD’s and DO’s. Thus, the Chiropractors had no personal stake in either a claimant’s or employer’s burden of proof, the burden of proof being the subject matter of the separation of powers challenge. Chiropractors do not have a right to submit evidence and are not subject to any evidentiary burdens of proof in workers’ compensation TTD or PPD hearings. The workers’ compensation reforms did not change the Chiropractors’ burden of proof – they

never had a burden of proof. It is only workers' compensation claimants and employers for whom the burden of proof provisions are alleged to have changed.

Thus, the Chiropractors do not have standing to challenge any of the burden of proof statutes this Court found to violate the separation of powers. With the severance of the provisions found to be unconstitutional special laws, there no longer even arguably existed a justiciable controversy between the Chiropractors and the Respondents. This Court erroneously addressed and ruled on the constitutionality of parts of three statutes for which the Chiropractors lacked standing, two of which statutes the Chiropractors never arguably challenged. Respondents request that *Opinion* ¶ 13 and the second and third sentences of ¶ 14 be reconsidered, vacated and withdrawn.

III. BECAUSE THE COURT DID NOT CONSIDER THE PRACTICAL AND REAL BASIS FOR THE DIFFERENCE IN TREATMENT BETWEEN CHIROPRACTORS AND DO'S AND MD'S, AND FAILED TO IDENTIFY THE CLASS APPROPRIATE TO THE FACTS AND LAW BEFORE THE COURT, THE OPINION ERRONEOUSLY CONCLUDED THAT THE CHALLENGED STATUTES WERE IMPERMISSIBLE SPECIAL LAWS.

A claimant's right to workers' compensation benefits "arises from the contractual relation between the employee and employer on the date of injury". *Scruggs v. Edwards*, 2007 OK 6, ¶7, 154 P.3d 1257, 1261. Thus the Workers' Compensation Code is enacted for the benefit of claimants and employers, not for the benefit of Chiropractors. Further, "[t]he body of public law that governs workers' compensation is entirely statutory." *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 15, n. 35, 130 P.3d 213, 221. In that statutory scheme, it is the claimants and employers who have the right under § 333 to submit evidence at permanent impairment hearings – not the Chiropractors. The Legislature has practically unlimited authority to designate the practice and procedure before the workers' compensation court. Thus, contrary to Chiropractors'

assertions, the implicated class is not the “physicians” who treat the claimants. The class is the claimants and employers. *See Zeier v. Zimmer, Inc.*, 2006 OK 98, 152 P.3d 861.

Sections 329 and 333 apply equally to all claimants and employers. Chiropractors have no right to present any evidence at Workers’ Compensation PPD hearings. Chiropractors have no constitutionally guaranteed right to serve as IME’s or QIME’s, or treating physicians. Just as *Zeier* implicated the class of all torts, the class implicated by §§ 329 and 333 in the 2011 workers’ compensation procedure and evidence amendments is the class of all workers’ compensation claimants and employers. And because the challenged workers compensation statutes operate equally on claimants and employers, the challenged statutes are not special laws.

Even if the “class” is determined to be “physicians”, the challenged statutes are not impermissible special laws. The Opinion failed to address the reasons for the difference in treatment between Chiropractors, MD’s and DO’s. An examination of those reasons reveals that even if the implicated class is deemed to be “physicians” rather than claimants or employers, the statutes still pass constitutional muster. Just because each type of “physician”, as defined by 85 O.S. Supp. 2011, § 326(D), does not also serve as an IME or QIME does not in and of itself make the statutes fail as special laws if there is a reason for the distinction in treatment. “For a special law to be permissible, there must be some distinctive characteristic warranting different treatment and that furnishes a practical and reasonable basis for discrimination.” *Grant v. Goodyear Tire & Rubber Company*, 2000 OK 41, ¶ 10, 5 P.3d 594, 598. There are such valid distinctions in the current case. Chiropractors do not have the same medical training or education as MD’s or DO’s and their scope of work is more limited. The practice of medicine by MD’s and DO’s includes a wide variety of specialties and covers a much broader range of treatment. MD’s and DO’s are trained to treat and evaluate the entire human body while the

scope of treatment by chiropractors is more limited. Thus, the statutes in question validly distinguish the Chiropractors from MD's and DO's and are not impermissible special laws.

In addition, the challenged statutes changing the role of chiropractors were enacted shortly after the Court of Civil Appeals issued its ruling in *Adecco Inc. v. Dollar*, 2011 OK CIV APP 43, 254 P.3d 729. In *Adecco*, the Court of Civil Appeals approved a chiropractor testifying regarding psychological overlay regarding a claimant for whom the chiropractor was not the treating physician. As shown by the Chiropractors' Application, Brief and Appendix submitted to this Court, testimony regarding mental condition would be outside a chiropractor's expected scope of competency. It is within the province of the Legislature to establish rules of evidence and procedure. *See* Proposition I, above. The challenged statutory changes serve the valid legislative interest in providing rules of evidence and procedure that foster the presentation of competent evidence in the workers' compensation court within the realm of the expert's expertise. Thus, the statutes are reasonably and substantially related to a valid legislative objective, and are not impermissible special laws, even if the implicated "class" were deemed to be "physicians" rather than "claimants". The decision holding the statutes and definitions to be impermissible special laws should be withdrawn and vacated.

CONCLUSION

For the reasons set forth above, the Respondents, Governor Mary Fallin and Oklahoma Attorney General E. Scott Pruitt, respectfully request that this Honorable Court grant rehearing and the Opinion rendered December 20, 2011, be vacated and withdrawn.

Respectfully submitted,



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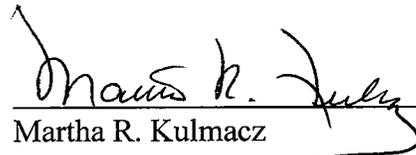
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Attorney for Respondents The Honorable Mary Fallin, in her Official Capacity only as Governor of the State of Oklahoma, and The Honorable E. Scott Pruitt, in his Official Capacity only as Attorney General of the State of Oklahoma

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of January, 2012, a true and correct copy of the foregoing document was mailed, postage prepaid, to:

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CASE NO. 109807

**APPENDIX TO RESPONDENTS' PETITION FOR REHEARING
STATUTES IN WHICH THE LEGISLATURE
PRESCRIBED A BURDEN OF PROOF**

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CLEAR AND CONVINCING EVIDENCE: 10 O.S. §40.5; 10 O.S. § 83 ; 10 O.S. § 7503-2.7; 10 O.S. § 7505-2.1; § ; 10 O.S. § 7505-4.1; 10 O.S. § 7505-5.1; 10 O.S. § 7505-6.3; 10 O.S. § 7700-308; 10 O.S. § 7700-624; 10 A O.S. § 1-4-603; 10A O.S. § 1-4-703; 10A O.S. § 1-4-705; 10A O.S. § 1-4-706; 10A O.S. § 1-4-710; 10A O.S. § 1-4-711; 10A O.S. §1-4-904; 10A O.S. § 1-4-909; 10A O.S. § 2-2-403; 10A O.S. § 2-5-208; 10A O.S. §2-5-210; 12 O.S. § 2506; 12 O.S. § 2611.7; 17 O.S. § 318; 21 O.S. § 701.10b; 21 O.S. § 1040.54; 21 O.S. § 1550.43; 21 O.S. § 1738; 21 O.S. § 1741; 21 O.S. § 2002; 22 O.S. § 1089; 22 O.S. § 1101; 22 O.S. § 1105; 22 O.S. § 1175.4; 22 O.S. § 1371.1; 23 O.S. § 9.1; 23 O.S. § 61.2; 30 O.S. § 3-111; 43 O.S. § 109.4; 43 O.S. § 112.2; 43 O.S. § 112.5; 43 O.S. § 601-401; 43A O.S. § 5-411; 43A O.S. § 5-415; 43A O.S. § 5-512; 43A O.S. § 7-101; 44 O.S. § 3276; 51 O.S. § 154; 51 O.S. § 252; 52 O.S. § 87.2; 59 O.S. § 147; 59 O.S. § 161.12; 59 O.S. § 161.13; 59 O.S. § 328.44a; 59 O.S. § 698.7; 59 O.S. § 698.14a; 59 O.S. § 698.16b; 59 O.S. § 698.19A; 59 O.S. § 698.25; 59 O.S. § 858-723; 59 O.S. § 858-828; 59 O.S. § 1010; 59 O.S. § 1370; 59 O.S. § 1689; 59 O.S. § 1750.7; 60 O.S. § 175.89; 63 O.S. § 1-740.3; 63 O.S. § 1-853; 63 O.S. § 1-1951; 63 O.S. § 2-422; 63 O.S. § 2-429; 63 O.S. § 2-431; 63 O.S. § 2-503; 63 O.S. § 2-506; 63 O.S. § 2-431; 63 O.S. § 3080.4; 63 O.S. § 3131.4; 63 O.S. § 3131.5; 63 O.S. § 5051.1; 63 O.S. § 219.1; 68 O.S. § 360.7; 70 O.S. § 3311; 82 O.S. § 1020.11; 85 O.S. § 326; 85 O.S. § 329; 85 O.S. § 332

PREPONDERANCE OF THE EVIDENCE: 2 O.S. § 2-14.1; 2 O.S. § 6-404; 2 O.S. § 9-24; 2 O.S. § 20-18; 2 O.S. § 20-56; 10 O.S. § 1419a; 10 O.S. § 7503-2.7; 10A O.S. § 1-1-105; 10A O.S. § 1-4-601; 10A O.S. § 1-4-602; 10A O.S. § 1-4-603; 10A O.S. § 1-4-707; 10A O.S. § 1-4-711; 10A O.S. § 1-4-809; 10A O.S. § 1-4-909; 12 O.S. § 990.4; 12 O.S. § 1501.1; 12 O.S. § 2009; 12 O.S. § 2611.7; 14A O.S. § 5-203; 18 O.S. § 1090.3; 19 O.S. § 450; 21 O.S. § 142.5; 21 O.S. § 701.10b; 22 O.S. § 60.17; 22 O.S. § 812.2; 22 O.S. § 991a-19; 22 O.S. § 991b; 22 O.S. § 1105; 22 O.S. § 1161; 22 O.S. § 1175.4; 22 O.S. § 1406; 22 O.S. § 1409; 23 O.S. § 61.2; 24 O.S. § 148; 25 O.S. § 1506; 27A O.S. § 2-6-206; 36 O.S. § 7004; 37 O.S. § 163.29; 37 O.S. § 521.1; 37 O.S. § 528; 37 O.S. § 531; 37 O.S. § 539; 40 O.S. § 2-207; 40 O.S. § 2-208; 40 O.S. § 61; 40 O.S. § 563; 43 O.S. § 109.3; 43A O.S. § 10-106; 47 O.S. § 7-116; 47 O.S. § 11-902b; 47 O.S. § 1505; 47 O.S. § 1506; 51 O.S. § 105; 51 O.S. § 162; 52 O.S. § 36.6; 59 O.S. § 1955; 63 O.S. § 2-431; 63 O.S. § 2-503; 63 O.S. § 2-506; 63 O.S. § 942a; 63 O.S. § 4255; 63 O.S. § 4256; 63 O.S. § 5053.6; 68 O.S. § 221; 70 O.S. § 6-101.26; 70 O.S. § 6-101.26; 76 O.S. § 28; 85 O.S. § 308; 85 O.S. § 312; 85 O.S. § 323; 85 O.S. § 341

SUBSTANTIAL EVIDENCE: 3 O.S. §111; 3A O.S. §203.3; 6 O.S. §207; 6 O.S. §310; 6 O.S. §2001.2; 10 O.S. §577; 10 O.S. §7502-1.1; 10A O.S. §2-9-107; 11 O.S. §51-101; 12 O.S. §2304; 17 O.S. §136; 17 O.S. §159.20; 17 O.S. §506; 19 O.S. §901.30; 22 O.S. §1093; 27A O.S. §2-6-206; 30 O.S. §3-306; 36 O.S. §6032; 43 O.S. §551-201; 43 O.S. §551-202; 52 O.S. §420.6; 56 O.S. §240.3; 59 O.S. §1266.1; 59 O.S. §1471; 63 O.S. §1-745.3; 63 O.S. §1-860.11; 68 O.S. §500.46; 70 O.S. §6-186; 75 O.S. §253

BEYOND A REASONABLE DOUBT: 12 O.S. §2304; 21 O.S. §498; 21 O.S. §693; 21 O.S. §701.11; 21 O.S. §1112; 21 O.S. §1290.20; 21 O.S. §1552; 22 O.S. §1371.1; 23 O.S. §9.1; 29 O.S. §7-206; 63 O.S. §2-506; 74 O.S. §152.9